No. 14390

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND & ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPELLANTS' REPLY BRIEF

S. W. BRETHORST
A. T. BATEMAN
RICHARD C. REED
of BRETHORST, FOWLER, DEWAR,
BATEMAN & REED
1710 Hoge Building
Seattle 4, Washington

CHARLES P. MORIARTY and
F. N. CUSHMAN
1012 United States Courthouse
Seattle 4, Washington
Attorneys for Appellants

FRAYN PRINTING COMPANY

No. 14390

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND & ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPELLANTS' REPLY BRIEF

S. W. BRETHORST
A. T. BATEMAN
RICHARD C. REED
of BRETHORST, FOWLER, DEWAR,
BATEMAN & REED
1710 Hoge Building
Seattle 4, Washington

CHARLES P. MORIARTY and
F. N. CUSHMAN
1012 United States Courthouse
Seattle 4, Washington
Attorneys for Appellants

INDEX

TABLE OF CASES

No. 14390

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND & ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPELLANTS' REPLY BRIEF

S. W. BRETHORST
A. T. BATEMAN
RICHARD C. REED
of BRETHORST, FOWLER, DEWAR,
BATEMAN & REED
1710 Hoge Building
Seattle 4, Washington

CHARLES P. MORIARTY and
F. N. CUSHMAN
1012 United States Courthouse
Seattle 4, Washington
Attorneys for Appellants

character, type or design of the fences protecting the newly seeded lawn areas. The right of the appellants to install these fences was established by authorities cited to the District Court:

> *Cohen v. Davies* (Mass 1940), 25 N.E. (2d) 223, 129 A.L.R. 735;
>
> *Merrill, et al v. Morris Court, Inc.* (Minn. 1930) 231 N.W. 231;
>
> *Mazey v. Loveland* (Minn. 1916), 158 N.W. 44; *Mead v. Strauss,* 202 Mass. 399, 88 N.E. 889.

The only finding of negligence made by the District Court, in essence, was in failing the remove the particular wire from the sidewalk where the appellee tripped (R. 13-15); which, under the only evidence in the case, had become broken due solely to the unwarranted acts of other persons for whose acts the appellants had no responsibility. That the appellants were compelled by the acts of irresponsible persons to adopt a daily maintenance program (Appellants' Brief pp. 26-29) in order to protect the planted and beautified areas is no different from the grocer, shopkeeper or restaurant operator who must daily, and more often, inspect and sweep his floors, walks, parking areas, etc. knowing customers carelessly knock vegetables on the floor, disarrange counters, track in mud and water, etc. Appellees are not relieved from the burden of showing that the misplaced object, be it foodstuff, liquid, or wire, had existed for a sufficient time to charge

appellants with constructive notice thereof, in the absence of a showing of actual notice of its presence.

II. REPLY TO SUMMARY OF ARGUMENT

It is to be observed that appellees place their entire reliance upon the sufficiency of the evidence to support the court's finding that the appellants had constructive notice. The absence of any actual notice is tacitly conceded.

III. REPLY TO APPELLEES' ARGUMENT

The sole question is whether or not there is any evidence to show that the wire over which the appellee fell had been out of place on the sidewalk for a period of time sufficient to charge the appellants with constructive notice of its presence and thereby with negligence in failing to remove the same. This is made abundantly clear by reference to the oral decision announced by the District Court at the conclusion of the case (R. 308) in which the court declared that its conclusion was reached because there was no:

> " * * * convincing showing or a showing by a preponderance of the evidence or any showing at all on the part of the defendants or anyone else in this case that a particular individual did actually make or that any individual acting for or on behalf of the defendants made an inspection of the premises near the place of the accident between the time the defendant's employee Dykeman ended his day's work and the time of the occurrence of this accident."

Practically all of the testimony discussed and alluded to by appellees (Appellees' Brief 3-7) is immaterial to this issue. Nowhere in their brief do appellees point to any evidence adduced at the trial which shows the wire over which the appellee tripped to have been present on the sidewalk for any period of time. The authorities cited and discussed in appellants' brief (pp. 13 through 25) illustrate clearly the concept of constructive notice as applied to cases of this type. Appellees' argument is grounded upon the contention that the system of barricades generally, installed by the appellants throughout appellants' project site to protect the newly seeded areas, were improperly installed, designed or constructed. Emphatically, no such finding was made by the District Court. The sole issue concerns the wire on the sidewalk over which, the court found, the appellee fell. To charge appellants with constructive notice thereof, it must be shown that such condition existed for a period of time sufficient for the appellants in the exercise of reasonable care to become aware of its presence. Consistent with all of the evidence in this case the wire could have existed on the walk for an instant only prior to the time appellee fell. The evidence does not support the finding that the appellants had constructive notice of its presence.

CONCLUSION

For the reasons set forth in Appellants' Brief and herein ,it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

S. W. Brethorst

A. T. Bateman

Richard C. Reed

of Brethorst, Fowler, Dewar, Bateman & Reed

1710 Hoge Building

Seattle 4, Washington

Charles P. Moriarty and F. N. Cushman

1012 United States Court House
Seattle 4, Washington

Attorneys for Appellants.